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IN THE

Supreme Court of the United States

October Term 1957

No. 521

In the Matter of the Application

of

WILFRED DANIEL MURTHA,

Petitioner-Appellant,

—against—

GEORGE P. MONAGHAN, Commissioner of the Harness Racing Commission of the State of New York,

Respondent-Respondent,

for an order annulling a determination of said respondent denying petitioner's application for a license as a mutuel clerk and for a further order directing said Commission to forthwith issue such license, pursuant to Article 78, C.P.A.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

DAVID M. MARKOWITZ
Attorney for Petitioner
261 Broadway
New York City

MICHAEL J. GAYNOR
Westbury, L. I., N. Y.
18 Carle Road
of Counsel

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Wilfred Daniel Murtha, respectfully prays for a writ of certiorari to the Court of Appeals of the State of New York, to review the order of that court, made July

Folios refer to record on appeal in Court of Appeals.

3, 1957, which (a) denied reargument and amended the remittitur to certify the constitutional question herein presented, (b) affirmed the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, entered February 24, 1956, which Appellate Division order had reversed the order of the Supreme Court at Special Term, New York County, dated, filed and entered August 11, 1956, which last order granted petitioner's application herein.

The Court of Appeals of the State of New York has not favored us with an opinion. It did however, affirm the Appellate Division and certify the constitutional question herein (Appendix page 31).

Opinions Below

The determination of the Court of Appeals of the State of New York as reported in 2 N. Y. 2d 819, and is reproduced in the Appendix, at page 31.

The opinion of the Appellate Division, First Department, reported in 1 App. Div. 2d 178, 148 N. Y. S. 2d 615, is reproduced in the Appendix, at page 34.

The opinion of the New York County Supreme Court, reported in 208 Misc. 1047, 144 N. Y. S. 2d 345 and reproduced in the Appendix, at page 51.

Jurisdiction

The date of the final judgment affirming the Appellate Division sought to be reviewed herein is July 3, 1957, when the remittitur was amended to certify the constitutional question herein.

This is a final judgment of the highest court of the state.

Date of entry before amendment
Jan. 10, 1957

Date of final judgment after amendment July 3, 1957

The petitioner has no further appellate remedy within the State of New York.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *
>
> "(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * *."

Questions Presented

1. The Federal question of substance which has been decided by the State Court is that the provisions of §63 of the Pari-Mutuel Revenue Law (Appendix pages 65 to 71) insofar as they prohibit appellant, as a public employee, from obtaining a license as a mutuel clerk are not in violation of appellant's rights under the Fourteenth Amendment.

This question is novel, transcends local interest, and is national in scope. There are, of course, no decisions squarely in point. The question stated broadly may be put:

Is pari-mutuel racing a government granted monopoly of such unique character that the State of New York has unlimited power to legally impose such drastic restrictions?

Before posing the specific question, this Court's attention is invited to another New York State statute (Public Officers Law, §74—Appendix page 62). This statute acknowledges the fundamental common-law and constitutional right of a public employee to engage in extra private employment, which is not in conflict with public duty.

2. The specific question presented by the enactment of the statute under constitutional attack herein is:

May this state legalize for all public employees extra non-conflicting private employment and prohibit some public employees from specified ministerial jobs in a duly licensed private enterprise, racing?

We are mindful, that this law does not prohibit public employees of the United States or any other state, or the identical public employee at pay below a set standard.

It does not prohibit any public employee from extra employment as an official (judges, starters, etc.) designated by respondent and paid by the duly licensed race track owner.

It does not prohibit any public employee as owner, trainer, driver or stable help.

Further such law, while mandating petitioner's exclusion, grants in another section thereof (§41a, Pari-Mutuel Revenue Law—Unconsol. Laws 7599a—Appendix page 60) permissive power to respondent to license for the same mutuel clerk employment denied petitioner herein, criminals, touts and race track frauds generally who, in the discretion of respondent, deserve such license.

3. Does the decision of the Court of Appeals of the State of New York operate to deny to petitioner the constitutional guarantees of the 14th Amendment, by depriving him of supplementary income from extra private employment as mutuel clerk, because he is a public employee?

Constitutional Provisions and Statutes Involved

These are printed in the "Appendix".

Statement of the Case

A mutuel clerk is one who performs the purely ministerial duties incident to the selling and cashing of mutuel tickets. Mutuel tickets are the tangible evidence of legitimate wagers at pari-mutuel race tracks, the method of conducting pari-mutuel betting.

Petitioner, a member of Local 23293, A. F. of L. and a public employee (day-time school teacher) prior to April 6, 1954 had been employed at night in the purely ministerial job of mutuel clerk by Roosevelt Raceway which was at all times a private enterprise and a regular licensee of the New York State Harness Racing Commission, a duly constituted state agency.

Said Commission refused, and continues to refuse, to issue a mutuel clerk license to petitioner, without which petitioner may not continue his remunerative mutuel clerk employment.

Many other public employees are similarly situated.

Petitioner was never a licensee because no mutuel clerk license was required prior to 1954, nor was any license for

any harness racing activity save only the track license itself. And, between April 1, 1954 and May 1, 1954, Roosevelt Raceway, at which track petitioner had been regularly employed for years as a mutuel clerk, was not in operation and petitioner had no need for and did not apply for a mutuel clerk license, which factually he could have had. However, Yonkers Raceway, another New York State track, was in operation during this period and the respondent required and actually issued mutuel clerk licenses to all public employees so employed at Yonkers Raceway.

"All such licenses, unless revoked for cause shall be for the period of one year from April first of the year in which the same shall be issued." (Section 41a—Appendix page 60).

Such a sample and bona fide license which was actually used after April 6, 1954 and up to May 1, 1954, is reproduced here:

"GA 3 No. 1925 126 18 0818

Social Security Number

NEW YORK STATE
HARNESS RACING COMMISSION
Temporary Permit Expires 4/30/54
SIDNEY BIMBERG

Whose Signature Photograph and Personal Description Appear on the Reverse Side Is Duly Licensed to Act as .....

GEORGE P. MONAGHAN

Expiration Date
March 31, 1955

GEORGE P. MONAGHAN
Commissioner"

The reverse side of license is omitted as unnecessary.

This individual public employee mutuel clerk, and many other public employees earning in public service in excess of the statutory limitation, actually worked as licensed mutuel clerks under licenses from respondent herein after April 6, 1954 and before May 1, 1954.

This is demonstrated to correct the erroneous impression this Court might get from the language of the intermediate Court below at folio 170, **"If prior to the enactment of subdivision 7 the commission had decided to require a license for this type of work, he could not have received a license by reason of the prohibition in paragraph (a) of subdivision one."**

This is error. The Commission, respondent, did require and issue mutuel clerk licenses prior to the enactment of subdivision 7.

On April 6, 1954, Section 63 (Appendix pages 65 to 69) was added to the pari-mutuel revenue law by **two separate chapters** of the 1954 Session Laws of New York State. Chapter 514 added the first five subdivisions thereof. This had the effect of excluding all public employees from all harness racing activities. By the very next chapter 515, **enacted the same day** a sixth subdivision was added, which eliminated some of the exclusions but served no useful purpose to petitioner and those similarly situated.

Section 63 was created as follows:

Appendix Page	*Chapter Number of Enactment*	*Year*	*Contents*	*Enactment Date*	*Effective Date*
65 to 68	514	1954	Five Subdivisions 1, 2, 3, 4 & 5	4/6/54	5/1/54
69	515	1954	One Subdivision 6	4/6/54	5/1/54
70	815	1955	One Subdivision 7	4/29/55	4/29/55
71	1036	1957	Amended Subdivision 6	4/28/57	5/1/57

The technique employed was to bar all public employees from all racing activities (C. 514, L. 1954—Appendix page 65 to 68) and by the very next legislative act (C. 515, L. 1954—Appendix page 69) remove some of the exclusions. Both chapters were enacted on April 6, 1954 and each by its own provisions became effective May 1, 1954.

On June 28, 1955, petitioner's application in due form for a mutuel clerk's license was rejected by respondent solely upon the ground that petitioner's public salary precluded his employment as a mutuel clerk at Roosevelt Raceway, under the ban of Section 63 of the Pari-Mutuel Revenue Law, Chapter 254, Laws of 1940, as amended (fols. 46, 47, 48).

Personal character and fitness are not at issue.

Petitioner's challenge to the constitutionality of said statute, insofar as the same prohibited the issuance of a mutuel clerk's license to a public employee solely because of his public employment, first appeared in print in his supplementary affidavit presented to the court of original jurisdiction (fol. 58), to wit:

> "Petitioner respectfully submits in supplement of the original petition that the provisions of Section 7615 Unconsolidated Laws (Section 63, Chapter 514, Laws of 1954 as amended by Chapter 515, Laws of 1954) are unconstitutional and in violation of the rights of petitioner" (Appendix pages 65 to 69).

A proper proceeding was duly instituted by petitioner for an order annulling the determination of said respondent, denying petitioner's application for a license as a mutuel clerk and for a further order directing said Commission to forthwith issue such license (fol. 5).

This action was commenced in the New York County Supreme Court and resulted in a favorable determination as follows:

> "Ordered that said respondent be and he is hereby directed to issue such license to petitioner forthwith" (fol. 15).

A succession of appeals finally reversing the foregoing order resulted in the decision of the Court of Appeals (Appendix page 31), which is the subject of this petition.

In the only discussion of the constitutional question below the Appellate Division stated:

> "If, as petitioner contends, subdivision 6 is unconstitutional because it is unreasonable or fails to provide equal protection, the effect would be to invalidate chapter 515 of the Laws of 1954. Paragraph (C), which is the provision of law precluding petitioner from obtaining a license, was enacted in chapter 514 of the laws of 1954. Accordingly, the petitioner, not being aggrieved thereby, lacks the standing to challenge the constitutionality of chapter 515 of the Laws of 1954" (fol. 183).

If petitioner lacks standing because of his income, no one has standing to challenge.

Petitioner's constitutional challenge, of course, was at all times directed at the provisions of Section 63, "* * * insofar as they prohibit appellant, as a public employee, from obtaining a license as a mutuel clerk", as certified by the Court of Appeals. (Court of Appeals' order of July 3, 1957.

The highest court of the State ruled adversely to petitioner on this federal question, certifying:

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States as follows: The appellant argued that the provisions of section 63 of the Pari-Mutuel Revenue Law (§40 as amended; Unconsolidated Laws, §7598) are void as being violative of the Fourteenth Amendment, insofar as they prohibit appellant, as a public employee, from obtaining a license as a mutuel clerk at Roosevelt Raceway. The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated or denied" (Appendix page 31).

It may be noted at this time that the Court of Appeals by application made by the petitioner on January 10, 1957 amended the remittitur to set forth the constitutional question. This amendment appears in Appendix page 31. The original decision of the Court of Appeals affirmed the order of the Appellate Division (Appendix page 32). The Appellate Division reversed the order of the Supreme Court which granted the relief sought by the petitioner herein.

Reasons for Granting the Writ

The unsettled state of said law as to constitutional validity is of serious concern not alone to the fourteen states which have pari-mutuel harness racing; but to all states where analogous situations may be presented. A determination here will affect all of their civil servants, racing commissions, race track owners and race track organiza-

* So in original.

tions such as the Jockey Club and the United States Trotting Association.

It is a unique and momentous question charged with serious implications of national concern as will be revealed in the argument herein.

The application of the discretionary power of this Court is sought because of the magnitude of the decision with particular emphasis upon its effect on the many thousands of public employees involved in this and other states, none of whom yet have attempted to enact such discriminatory legislation. It is believed that the outcome of this petition is awaited by the legislatures of other states.

And, the unique feature of this law, which is in essence that public employees and race track operators as distinct classes have sacrificed public confidence and are unworthy of trust and therefore may not associate even for legitimate mutual benefit.

The unusual principle of law it establishes, New York State may discriminate by the simple expediency of making **two separate laws** barring the entire class in the first law and exempting the favored in the next law.

The Court of Appeals of the State of New York has decided an important question of constitutional law, adversely to petitioner, which this Court has never passed upon directly and which should be settled by this Court.

Sin is evil. All are agreed. The law, however, may not make illegal an innocuous action, because some actors might be sinners, dependent entirely upon individual character. The law presumes innocence not guilt, assuming, as we must, to give any legitimate purpose to the statutory

provisions under constitutional attack herein, that the legislature found from ample evidence, that public service and the "Sport of Kings" are antithetical. It is no justification for prohibiting some public employees from engaging in extra non-conflicting employment in private enterprise, without regard for their personal character and competence.

United States government employees, public employees of other states and some local public employees are favored by this law, as are the employees of private industry. It is one thing for a state to say public employees must be like Caesar's wife; and to that end set rigid character standards, but it is quite another thing to say that the character of certain public employees, who sacrifice their leisure at night and usually during vacation to accept legitimate extra work in the purely ministerial capacity of mutuel clerk for a duly licensed private enterprise does not meet the character requirements for public service. This is particularly so, when the same law says the identical individual and similarly employed public servants, below a set public pay, do have the necessary character fitness. And, while the public jobs of the former must be forfeited, **the privileged need not be.** And, too, the race track operator should lose his license for hiring such tainted help.

It is noteworthy that no New York State law prohibits any public employee from extra, non-conflicting employment in such similarly licensed monopolies as railroads, public utilities or various aspects of the entertainment, cabaret and liquor business.

The presumption of innocence is the fundamental basis of all law.

An influential politician, whether holding a public job or not, might procure some improper advantage, for a race track. A court clerk might "fix" a speeding ticket and a public school teacher might promote the unworthy child of a race track operator. **These remote possibilities, based upon the presumption of guilt, do not constitute the evil contemplated by the law.** They are ubiquitous and applicable to all callings.

If it be urged that unscrupulous licensees (race track owners) of the State of New York might conceivably purchase political influence for a sinecure at a race track from unscrupulous public employees, and therefore the state may impose the unusual restrictions herein to promote public welfare, the complete answer is apparent. If racing in New York State cannot be properly regulated and controlled without denying individual fundamental rights, it must be abolished.

However, there is really no substance or merit to such argument. It would be equally fallacious to similarly urge that because unscrupulous licensees (race track owners) might purchase favorable publicity to achieve the necessary legislation required to induce the state to finance the erection of a "dream track", the state may similarly bar certain employees of every means of communication (press, radio, television, etc.) from purely ministerial race track employment.

True an unscrupulous track owner, in selfish interest to achieve an illegal advantage, might conceivably purchase improper publicity or political influence, assuming there are such commodities, from an equally unscrupulous private employee or public employee. We always have the

unscrupulous with us, but it is monstrous to urge that because a member of a class might be unscrupulous, the entire class must suffer. Moreover, and obviously, the same result could be obtained in the much more practical way for cash on the barrel head, or the sinecure could be given to a designee.

Persons of unbalanced, evil or uncivilized minds do not form a definable societal class. Each class is infested with them and the law may only deal with them properly. And, public employees as a class are as honorable as the employees of private industry.

Search as it will, this Court will find no evil, which the statutory provisions herein challenged purport to correct.

Moreover, assuming but not conceding the evil, the reasonable relation between the harsh restrictions herein and the evil which this Court must see is totally lacking. Further, these restrictions exceed the bounds of reason and are definitely unduly oppressive upon individuals and classes.

While requiring a license may be a reasonable regulation, the total exclusion of some public employees granting a monopoly to the favored is unreasonable and invalid.

And, too, Public Officers Law section 74 (Appendix page 62) eliminates completely the need for the harsh restrictions herein.

By promulgating this Code of Ethics for public employees, the State Legislature necessarily takes a position at complete variance with respondent herein.

Petitioner has a clear constitutional right to work as a mutuel clerk. His public employment in no way vitiates

that right. No more than it vitiates his right to any other legitimate activity or employment, which is not in conflict with his public employment.

This right, acknowledged by Public Officers Law section 74 (Appendix page 62), does not lessen or become a privilege, when the extra employment is as mutuel clerk. Nor is petitioner's privilege to serve the public, properly achieved, jeopardized by any honorable conduct not in conflict with his public duty, including augmenting his meager public pay by extra legitimate employment in private enterprise as mutuel clerk in spare time at night and usually during vacation.

Many public employees had their various ministerial raceway jobs, such as mutuel ticket sellers, mutuel ticket cashiers, mutuel ticket counters, mutuel ticket messengers, parking lot attendants, lavatory attendants and similar related ministerial employment even before they entered public service and they were accepted for public service with full knowledge of this extra activity after passing the usual rigorous searching character examination. And many entered the public service first and then, with full knowledge and consent of their public employer, accepted extra race track jobs. And no one of any such public employees has ever fallen in disgrace.

All public employees are rigidly screened for character fitness by a proper governmental agency. The Court below judicially determined:

> "It appears and is not contradicted that his duties as a mutuel clerk in no way interfere with nor conflict with or in any wise affect the performance of

petitioner's employment and duties as a teacher" (fol. 89).

and

"* * * note that in all of the disclosures, not a single derogatory word was contained in the Moreland Commission's Report nor a single improper act uncovered involving a public employee serving as a mutuel clerk" (fol. 92).

and

"It is obvious that the continuation of this type of personnel, in the employment of the tracks is neither harmful nor detrimental to racing. As hereinbefore pointed out, no breath of scandal has been mentioned or attributed to any of this type of personnel employed at the race track" (fol. 107).

"There is no factual dispute here and the sole question involved is one as to the interpretation of the applicable statutes" (fol. 110).

This was not disturbed on appeal, the Appellate Division held,

"We accept what is undenied—that petitioner is a decent, law-abiding citizen holding a responsible position in a school system in Nassau County. But this racing legislation was not aimed at him and those similarly situated" (fol. 177).

Petitioner agrees it was not aimed at him and urged an interpretation that would not strike him. The intermediate Court construed it otherwise and the Court of Appeals affirmed without comment. Though this Court might accept the construction of the State Court; its constitutionality, as so construed, is at issue.

Of course, whatever it was aimed at, its effect was injurious to petitioner and those similarly situated, although both the lack of necessity for and the lack of reasonable relation between the statutory prohibitions and the evils sought to be cured have been affirmatively established and judicially determined.

In the case at bar we are dealing with discrimination against and even among innocent public employees, all of whom are citizens, and in favor of employees of private industry, some of whom may not be citizens, for extra ministerial legitimate employment at night at harness tracks. Surely the citizen is entitled to equality with the alien. And individual rights of public employees are protected by the Constitution.

Whatever the proclaimed purpose of this statute, its inescapable effect has been to deny extra legitimate employment in private industry (Racing) to certain public employees and to deny the said private industry the continued services of honorable, experienced and competent personnel, and the acquiring of new such personnel, and to deny government service the talents of those who, for economic reasons, feel constrained to refuse to serve the public, if by so serving they must forego their right to supplement their public pay by accepting or continuing a legitimate extra race track employment, and to crassly reflect upon the honor and integrity of both race track owners and public employees as distingt classes of society. Public servants have resigned to keep their much more profitable and much less arduous legitimate race track jobs. Many in public service have declined promotion to higher and more responsible positions so as not to become disqualified from

their extra legitimate harness race track employment by the slight salary increase promotion in public service would entail. Some have applied for and received retirement pension; others have changed from full time to part time public employment; others have applied for transfer of public employment and still others for leave of absence during the racing season. Some have even requested public salary reduction to meet the legal requirement to continue their profitable legitimate extra race track employment. The entire public service has been seriously impaired by an over-zealous and utterly ineffectual illegal attempt to legislate morals.

The obvious ultimate **effect** of this law has been to visit financial hardship upon an honorable class of citizenry and impugn the integrity of innocent and guilty alike; and require a legitimate private enterprise, a race track operator, to substitute untried, inexperienced help in place of the honorable, experienced, competent personnel excluded, resulting in public inconvenience and resentment.

This Court will determine from the substance and effect the purpose of this statute. It may not assume "compelling necessity for", nor "reasonable relation between restrictions and a claimed evil", nor the existence of the "evil", nor that the restrictions are not "oppressive" upon individuals or classes.

The contrary will be established by petitioner herein.

Petitioner respectfully submits that this Court should not endeavor to judicially determine whether public confidence in racing ever existed, waned or was restored. These are purely opinions impossible of proof and should not be considered.

No expert opinion was offered nor would it be worthy.

Nor should this Court sanction the course of pure speculation indulged below to uphold the legislative action herein: "Information may have been before the law-makers that, for the most part, this group obtained employment in minor jobs at a track and generally their influence in public life was not such as to be of value or assistance to the track owners and operators" (fol. 180). "This group", of the foregoing quote, were the low salaried public employees.

Low salary creating sheer necessity might more readily induce corruption. Many influential politicians hold low salaried public jobs, and many such are exclusively in private enterprise.

Such matters are mere inferences drawn from a purely suppositious opinion of the Legislature. There is at least equal force to the suppositious opinion, that the Legislature may have deliberately made a scapegoat of the public employee to conceal the inefficiency of a state agency and appease public indignation and clamor for reform aroused by a Moreland Commission's revelations, which, of course, as was judicially determined herein, in no way involved any public employee serving as a mutuel clerk or in any ministerial capacity (fols. 89, 92, 107, 110 and 177).

This Court should not balance these two adverse opinions against each other to determine judicially where the weight of the evidence lies. There is nothing in this record to warrant such speculation.

This Court is duty bound to ignore both opinions, since the proclaimed purposes of this law is immaterial and no aid in determining the real question which is its substance, operation and effect.

The lower court's improper speculation is refuted here simply because said court, in construing an amendatory law lifting previously imposed restrictions (C. 815—L. 1955—Appendix page 70), considered it disadvantageously to petitioner to arrive at a rigid construction limiting its benefits solely to "participants", deliberately excluding "employees." Although, ordinarily, such amendatory law is construed liberally to confer the greatest possible benefit.

The intermediate court below has made a fine distinction between "participants" and "employees" at harness race meets. It limited "participants" to owners and their hired hands and possibly "officials." And, it definitely ruled mutuel clerks were "employees" and not "participants" (fols. 163, 164 and 165).

Incidentally, while natural persons only may be licensed as owners at thoroughbred tracks, no law prohibits the licensing of firms, associations or corporations as owners at harness race tracks (fol. 173).

Misled by its own fine distinction, the intermediate court erroneously proceeded to pile inference upon supposition (fols. 180, 181, 182 and 183), to improperly approve this unconstitutional legislative action.

In March, 1955, prior to the enactment of C. 815—L. 1955—(Appendix page 70), discussing another and different part of this statute, this same Appellate Division court below affirmed the lower court's following language:

> "It was the plain intent of the statute, among other things, to effect a complete divorcement between all public officials and all proprietors of race tracks. The Legislature found, from ample evidence apparently, that public service and the sport of kings are

antithetical." (Maguire v. Monaghan, 206 Misc. 550, 134 N. Y. Supp. 320, affd. 285 App. Div. 926, 141 N. Y. Supp. 2d 501, app. den. 308 N. Y. 1054.)

Incidentally, neither the wisdom nor constitutional force of this language was further explored, because appeal was denied.

Obviously, on its face, it is clear error. **Never was the divorcement complete. The original legislation contained exceptions. And, obviously, it cannot be antithetical for public employees above the set salary stipulation, and not for those below. Moreover, scandals in racing no more justify the inference that public service and the sport of kings are antithetical, than would similar scandals in the banking business.**

This is not a moral question. It is strictly a legal question. Any moral objection to racing per se has been completely disposed of by the duly licensing thereof by the State.

Concededly, individual rights must yield to the general welfare. However, this Court, to sanction drastic oppressive restrictions of individual rights, must clearly see a distinct evil and the reasonable probability the restrictions will cure it, and are not unduly oppressive.

The State has broad discretion in classification, in the exercise of its power of regulation. That very concession establishes the fact that the State has not unlimited powers. And the primary question herein is, has the State arrogated to itself a power prohibited by the Constitution of the United States, particularly Amendment XIV thereof (Appendix page 59)?

It is respectfully submitted, that neither the difference between public employment and private employment, nor the difference in pay between two public employees doing the exact same work creates the real difference contemplated by the law to make this classification impregnable to constitutional assault by any aggrieved member of the divided class. Moreover, this law bars the same public employee, school teacher, when his public salary exceeds the statutory limitation, so patently no real clear distinction exists. Unfortunately, in haste, the Legislature **unreasonably exceeding the recommendations of a distinguished and competent Governor,** has enacted law, which impedes rather than promotes public welfare and definitely unconstitutionally infringes upon rights of petitioner safeguarded by the Constitution, and Section 63 should be declared void in its entirety.

If it be argued that under all the circumstances incident to hastily invoking the police power herein on April 6, 1954 to accommodate the opening of the Harness Racing Season on April 12th, it was a valid exercise of that police power in view of the disclosures, mindful particularly that although authority in law to require licenses of mutuel clerks was duly conferred upon respondent one year before on April 2, 1953, by Chapter 391, Session Laws of New York State, and said respondent for some unexplained reason had failed to act prior to the restrictions herein (Appendix page 60).

The complete answer is that whether the police power was validly or invalidly invoked, it is invalid now and was when this litigation was instituted. It was invoked when no state license was required for any harness racing ac-

tivity except the track license itself. Since then and before this litigation was initiated, the state inaugurated a licensing policy requiring a license for almost every harness racing activity including mutuel clerks. After this licensing policy was actually put into effect on April 12, 1954, subdivision 7 was added to Section 63 by Chapter 815 of the Session Laws of the State of New York for 1955 (Appendix page 70). It specifically provided for the repeal of the licensing restrictions of Section 63, subdivision 1 (a), but was silent as to the restrictions against employment for a licensee of the state (a race track operator) contained in 1 (c) (Appendix page 66).

In the courts below petitioner argued that the enactment of the new subdivision 7 had the effect of necessarily removing by implication the inconsistent old restrictions of 1(c) as to any harness racing employment subject to and controlled by licensing. This contention was upheld by the court of original jurisdiction but reversed on appeal, the appellate court holding subdivision 7 removed only the prohibition against licensing and did not disturb the prohibitions against employment for a licensee contained in 1(c). Petitioner is firm in his contention that the court of original jurisdiction made a proper determination of the statutory construction question herein and the appellate courts are in error. However, the important point is that the circumstances herein are such now and were such at the instigation of this proceeding as to render the excessive exercise of the police power invalid now. In the case of *Defiance Milk Products* v. *Du Mond* (309 N. Y. 537, 541) we find Desmond, *J.* writing for the court:

> "And even though a police power enactment may have been or may have seemed to be valid when

made, later events or later discovered facts may show it to be arbitrary and confiscatory (Abie State Bank v. Bryan, 282 U. S. 765, 772)."

No preliminary open public legislative hearings to determine the advisability of this law were ever held.

A Governor, whose aversion to gambling is common knowledge, confronted with a situation, merely proposed in a hasty message prior to the publication of the Moreland Commission's Report and probably because of the imminence of legislative adjournment (Appendix page 73), that public employees "be prohibited from selling goods or services to any licensed racing association." He never recommended the prohibition of purely ministerial employment. Nevertheless, the legislature enacted the unreasonable and invalid restrictions hastily, before the publication of the Moreland Commission's Final Report (fol. 92).

> "The petitioner had been employed at said Roosevelt Raceway as a mutuel clerk during the years from 1947 to 1953, except during such period of time when he was serving in the Navy" (fol. 87).

The state may prefer citizens on public works even through subcontractors, because it is spending the state's money. But may not discriminate between citizens, unless it promotes general welfare (*People* v. *Crane*, 214 N. Y. 154, by Cardozo, *J.*).

In the case of *People* v. *Klink Packing Co.* (214 N. Y. 121, 129), Hiscock, *J.* stated:

> "* * * * The court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof,

and it must see that the latter do tend in some plain and appreciable manner towards the accomplishment of some of the objects for which the legislature may use this power."

And further, at page 137:

> "So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be made the basis of legislative classification, which has a real and reasonable relationship to the difference which thus exists."

This hurtful and discriminatory law unconstitutionally oppresses a class by abruptly withdrawing extra legitimate income and confers a monopoly on all other classes unmolested and free to enjoy their enhanced profits at the expense of their oppressed brothers.

As construed by the state court, it is unjust, illegal class discrimination and invalid.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, this Court stated:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *Lawton* v. *Steele*, 152 U. S. 133, 137, this Court stated:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distin-

> guished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

The jealousy with which the courts guard individual rights is well recognized. It is petitioner's position that the Legislature may not correct an evil (even conceding it exists) by a statute which discriminates in favor of a particular group or against the others.

This attempt to classify public employees and track operators as untrustworthy is similar to a statutory provision which was condemned in the case of *Wormsen* v. *Morse*, as Commissioner (177 Misc. 19, 29 N. Y. Supp. 2d 798). There a public evil involving morality actually existed, and evidence had been presented showing abuses by licensed massage operators, twenty arrests in two years and general immorality. The Court therein, determining there was no relationship between the statutory prohibitions and the general welfare, stated:

> "Clearly, none at all. Two years citizenship, or in fact, any citizenship, is not of itself a reasonable yardstick to determine whether one is fit to prosecute the profession of massage operator. It is not

a reasonable assurance that the operator is healthy or moral or decent or loyal to the public he is called upon to serve. And since enactment bears no relation to the general welfare, it is arbitrary, discriminatory, and calculated to invade the liberty and property of the persons affected in violation of their constitutional rights. * * *

* * * This legislation, moreover, suffers from the added vice of attempting to draw a distinction as between citizens themselves." (p. 23)

For a statute to withstand constitutional assault, it must be reasonable and bear a just and reasonable relation to the promotion of general welfare, and avoid arbitrary discrimination between persons. It must prevent a manifest evil. (*Smith* v. *Texas*, 233 U.S. 630; *Burns Baking Co.* v. *Bryan*, 264 U.S. 504; *People* v. *Crane*, 214 N.Y. 154, affd. 239 U.S. 195.)

In *Smith* v. *Texas*, *supra*, at page 638, the Court stated:

" * * * there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employe. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves."

While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which is asserted to violate the Federal Constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void. (*Standard Oil Co.* v. *Graves*, 1919, 39 S. Ct. 320, 249 U.S. 389, 63 L. Ed. 662.)

The construction that the state court has put upon this statute makes it discriminatory and invalid.

Proper regulations promulgated by a state, as employer governing its employees, should not be confused with statutory law enacted by a state, as lawmaker for all of its people.

Certainly, racing is not evil *per se*. No state which duly licensed it, may so determine. It is even more difficult to see any reasonable relationship between the harsh restrictions herein and any illusory evil one might conjure up; and the reasonable probability, that the restrictions herein tend in some appreciable manner to correct something requiring correction. Finally, the clear oppression upon individuals and classes is conspicuously apparent. The magnitude of this question defies exaggeration. It embraces discrimination by technique.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, that the constitutional question properly presented may be settled and determined. Its importance and extent is obvious and has been established herein.

WHEREFORE, your petitioner respectfully prays for a writ of certiorari to be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding said Court to certify and to send to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings by the Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order of the Court of Appeals may be reversed, and that petitioner be granted such other and further relief as may be just and proper.

A determination here is awaited and will serve as a guide for all state legislatures.

WILFRED DANIEL MURTHA
Petitioner

by DAVID M. MARKOWITZ
Attorney for Petitioner

MICHAEL J. GAYNOR
of Counsel

APPENDIX

Decision on Reargument by New York Court of Appeals

COURT OF APPEALS July 3, 1957

Mo. No. 273

In the Matter of

the Application of WILFRED DANIEL MURTHA,

Appellant,

vs.

GEORGE P. MONAGHAN, Commissioner of the Harness Racing Commission of the State of New York,

Respondent,

For an Order &c.

Motion for reargument denied. Motion to amend the remittitur granted. Return of the remittitur requested and when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: The appellant argued that the provisions of section 63 of the Pari-Mutuel Revenue Law (§40 as amended; Unconsolidated Laws, §7598) are void as being violative of the Fourteenth Amendment, insofar as they prohibit appellant, as a public employee, from obtaining a license as a mutuel clerk at Roosevelt Raceway. The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated or denied.

Original Order of Reversal by Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 14th day of February, 1956.

Present:

HON. CHARLES D. BREITEL,
Justice Presiding,
EARLE C. BASTOW,
BERNARD BOTEIN,
BENJAMIN J. RABIN,
FRANCIS BERGAN,
Justices.

9691

[SAME TITLE]

An appeal having been taken to this Court by the respondent-appellant from an order of the Supreme Court, New York County, entered on the 11th day of August, 1955, directing the New York State Harness Racing Commissioner to issue to the petitioner a license to act as a mutuel clerk, and said appeal having been argued by Mr. Daniel M. Cohen, of counsel for the appellant, and by Mr. Max M. Bernstein, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order appealed from be and the same hereby is reversed with $20.00 costs and disbursements to the appellant and the petition dismissed.

Enter:

CLERK.

Original Order of Reversal by Appellate Division

SIR:

PLEASE TAKE NOTICE that the within Order of Reversal will be presented for settlement to the Appellate Division of the Supreme Court, First Department, at the Appellate Division Courthouse, 25th Street and Madison Avenue, in the Borough of Manhattan, City of New York, on February 24, 1956, at 11 A. M.

Dated: New York City, New York, February 17, 1956.

Yours, etc.,

JACOB K. JAVITS,
Attorney General
of the State of New York,
Attorney for Appellant,
80 Centre Street,
New York 13, New York.

To:

MAX M. BERNSTEIN,
Attorney for Respondent,
16 Court Street,
Brooklyn, New York.

Opinion of the Appellate Division, First Department

SUPREME COURT, APPELLATE DIVISION,

FIRST DEPARTMENT, January 1956.

CHARLES D. BREITEL, *J. P.*,
EARLE C. BASTOW,
BERNARD BOTEIN,
BENJAMIN J. RABIN,
FRANCIS BERGAN, *JJ.*

9691

In the Matter of the Application

of

WILFRED DANIEL MURTHA,

Petitioner-Respondent,

GEORGE P. MONAGHAN, Commissioner of the Harness Racing Commission of the State of New York,

Respondent-Appellant,

For an order annulling a determination of said respondent denying petftioner's application for a license as a mutuel clerk and for a further order directing said Commission to forthwith issue such license, pursuant to Article 78 CPA.

Appeal from order of the Supreme Court at Special Term (Markowitz, *J.*) entered August 11, 1955, in the New York County Clerk's office directing the New York

State Harness Racing Commissioner to issue to petitioner license to act as a mutuel clerk.

DANIEL M. COHEN of counsel (JAMES O. MOORE, JR. with him on the brief; JACOB K. JAVITS, Attorney General) for appellant.

MAX BERNSTEIN for respondent.

BASTOW, *J.*:

The Commissioner of Harness Racing appeals from an order directing him to accept petitioner's application for a license as a mutuel clerk and to issue such license. The petitioner is employed by the Board of Education, Union Free School District No. 23, in Nassau County, as a physical education teacher and receives an annual salary of $6,700. Between the years 1947 and 1953, except during absence in the military service, petitioner was employed as a mutuel clerk at Roosevelt Raceway.

In June 1955, petitioner filed with the New York State Harness Racing Commission a written application for a license to act as a mutuel clerk. On June 28, 1955, by written communication, counsel for the Commissioner informed petitioner that his application could not be accepted for the reason that he was a public employee earning in excess of $5,000 per year and therefore came within the ban of Section 63 of the Pari-Mutuel Revenue Law, chapter 254, Laws of 1940, as amended. Thereafter, this proceeding was commenced to compel the issuance of the license.

Before posing the legal problem to be determined, it ht be helpful to sketch some of the statutory background

against which this controversy arose. At the general election in 1939, by vote of the people, an amendment to section 9 of article 1 of the Constitution was approved vesting in the Legislature authority to prescribe for pari-mutuel betting on horse races. Thereafter, the Legislature enacted chapter 254 of the Laws of 1940 prescribing the conditions under which the pari-mutuel method of betting on horse races should be lawful. The enactment dealt with two types of racing—the first, running or flat racing and the second, harness or trotting racing. The act was supplemental to chapter 440 of the Laws of 1926, which was continued in full force except as inconsistent with the new law.

The 1926 enactment was applicable to both running and trotting races but the only provision for licensing required any corporation or association proposing to conduct running races or steeple chases to obtain a license from the State Racing Commission. (L. 1926, ch. 440, §7.) Section 9 of the same law specifically exempted trotting associations from the licensing requirement. By Laws of 1934, chapter 310, section 5, the 1926 act was amended by adding a new section 9-b mandating The Jockey Club to license owners, trainers and jockeys. The Club was given permissive power to license such other persons "exercising their occupations or employed at race meetings." These provisions, however, were applicable only to running races and not to trotting races. This particular provision was not disturbed by the general enactment of 1940 relating generally to pari-mutuel betting. Parenthetically, and for the sake of historical accuracy, this stated provision of the 1934 enactment was struck down in Matter of Fink v.

Cole, 302 N. Y. 216, 225, on the ground that the delegation by the Legislature of its licensing power to The Jockey Club, a private corporation, was "such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of section 1 of Article III of the Constitution of this State." Thereafter, the provision was repealed and a new section 9-b was enacted mandating the State Racing Commission to license "owners, trainers, assistant trainers and jockeys, jockey agents and stable employees" at running races and steeple chases. (L. 1951, ch. 324, §4.) In 1952, this section was further amended to provide that natural persons only were to be licensed as owners and that such term should be deemed to include part owners and lessees. (L. 1952, ch. 77, §1.)

Directing our attention to statutory provisions relating to trotting races, we find the first provision for the licensing thereof in the 1940 enactment. It was there provided that any association or corporation desiring to conduct harness race meetings at which pari-mutuel betting should be permitted was required to apply annually for the issuance of a license to the State Harness Racing Commission. (L. 1940, ch. 254, §40.) In 1953, the Legislature provided for the licensing of participants and employees at harness race meetings. Chapter 254 of the Laws of 1940 was amended to add a new section, 41-a, providing that the State Harness Racing Commission "may license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe, including, if the commission deem it necessary so to do, owners, and some or all persons exercising their occupation or employed at harness race meets." (L. 1953, ch. 391, §8.)

To summarize the foregoing, we find that on January 1, 1954, there existed different licensing provisions for running races and harness racing. As to the former, any corporation or association desiring to hold running races or steeple chases was required to obtain a license annually from the State Racing Commission (L. 1926, ch. 440, §7; as amended). It was also mandatory, however, for an association or corporation desiring to conduct harness race meetings at which pari-mutuel betting was permitted to obtain an annual license (L. 1940, ch. 254, §40, as amended). It was further mandatory that owners, trainers, assistant trainers and jockeys, jockey agents and stable employees at running races and steeple chases be licensed. (L. 1926, ch. 440, §9-b, as added L. 1934, ch. 310, §5, as amended.) On the other hand, the State Harness Racing Commission was given permissive power to license drivers and such other persons participating in race meets as the Commission might by rule prescribe, including owners and some or all persons exercising their occupation or employed at harness race meets. (L. 1940, ch. 254, §41-a, as added L. 1953, ch. 391, §8.)

It should be noted that from 1940 to 1953 the Harness Racing Commission did not directly exercise its mandatory licensing powers. During these years the Commission under a grant of general powers was given the right to "adopt the rules and regulations of The United States Trotting Association not inconsistent with this act to carry into effect its provisions." (L. 1940, ch. 254, §36.) In the 1952 Interim Report of the New York State Joint Legislative Committee to Study All Laws, Rules and Regu-

lations relative to Horse Racing [Leg. Doc. #49 (1952)], it was pointed out that The United States Trotting Association, a private corporation, was, in the practice which had prevailed with respect to the issuance of licenses, the counterpart of The Jockey Club in the field of running races. It was stated that all licenses in the harness racing area were issued by The Trotting Association. (Report P. 23.) The Committee, among its findings, stated that "(i)n harness racing, all licenses have heretofore been issued by the United States Trotting Association, a private corporation, which is the counterpart of The Jockey Club in flat racing, and under the principles of the *Fink* decision [Fink v. Cole, 302 N. Y. 216, heretofore discussed in this opinion] such licensing power cannot constitutionally be delegated to private agencies." It was recommended that the harness racing law be amended to confer upon the Harness Racing Commission all licensing power. (Report, p. 82.) This was done at the next session of the Legislature (L. 1953, ch. 391, §§2, 8).

It appears that the Harness Racing Commission did not exercise permissive licensing powers also granted to it by this enactment because we find the Joint Legislative Committee returning to the subject of licensing in its 1954 final report [Leg. Doc. #45 (1954)]. It was stated that "(t)his Committee sponsored legislation at the 1953 legislative session, which became chapter 391 of the Laws of 1953 (now section 7599-a of the Unconsolidated Laws), and was effective April 2, 1953. Under that law, the Harness Racing Commission was specifically authorized to license 'all persons exercising their occupation or employed at harness race meets.' The budgetary appropria-

tion of the Harness Commission was increased by $25,000 for the purpose of providing the funds for putting the law into effect. For some unexplained reason, the Commission completely failed up to this date to put this law into effect. This committee and the Legislature had thus fully recognized the need for screening track employees, and had provided the machinery for doing it. Had the Harness Racing Commission exercised the power given to it, many of the labor abuses would have been avoided. We recommend that the newly appointed Commissioner of Harness Racing put this licensing law into effect immediately." (Report, p. 25). It appears that in response to the strong suggestion of this Legislative Committee, the Harness Racing Commission took some steps to license individuals. During the year 1954, it received 11,417 applications and of that number 230 persons were denied licenses for not being fit and proper persons or for other restrictions under the law. [Annual Report (1954) New York State Harness Racing Commission, p. 11.] Research does not disclose, however, that this licensing was done pursuant to any prescribed rule as required by section 41-a. This conclusion is fortified by the 1955 Annual Report of the Commission wherein it is stated that "early in 1955 the Commission promulgated a rule requiring all persons employed or participating in harness racing to obtain an occupational license." [Annual Report (1955) New York State Harness Racing Commission, p. 10; see, also, New York State Harness Racing Commission, Administrative Rule No. 4, adopted March 29, 1955, effective April 1, 1955.] These facts are here stated so that there will be an understanding of the extensive used and unused

licensing powers of the Harness Racing Commission, which have a pertinency in the consideration of the problem to be ultimately presented.

On October 8, 1953, the Governor, by an Executive Order promulgated under section 6 of the Executive Law, appointed a so-called Moreland Act Commission to make a thorough study of all phases of harness racing. This resulted in a series of enactments by the Legislature in 1954. (L. 1954, chs. 5, 510-515, inc.) We are here concerned primarily with chapters 514 and 515. The former chapter amended chapter 254 of the Laws of 1940 by adding thereto a new section to be section 63. It provided in part as follows:

> "1. No public officer, public employee or party officer shall:
>
> (a) hold any license from the state racing commission or the state harness racing commission; or
>
> (b) own or hold, directly or indirectly, any proprietary interest, stock or obligation of any firm, association or corporation (1) which is licensed by either of such commissions to conduct pari-mutuel racing, or (2) which is licensed to conduct its occupation, trade, or business at race tracks at which pari-mutuel race meets are conducted, or (3) which owns or leases to any licensed association or corporation a race track at which pari-mutuel racing is conducted, or (4) which participates in the management of any licensee conducting pari-mutuel racing; or
>
> (c) hold any office or employment with any firm, association or corporation specified in paragraph (b) of this subdivision; or

> (d) sell (or be a member of a firm, or own ten per centum or more of the stock of any corporation, which sells) any goods or services to any firm, association or corporation specified in paragraph (b) of this subdivision. * * *"

This chapter contained four additional subdivisions that do not require consideration. At the same session, the Legislature adopted chapter 515 of the Laws of 1954. This amended the last quoted enactment by adding subdivision 6 reading as follows:

> "6. The provisions of paragraph (c) of subdivision one of this section shall not apply to a public employee of a political subdivision (other than a police officer or paid employee of a police department, sheriff's office, district attorney's office or other law enforcement agency) whose compensation is less than five thousand dollars per annum if the local legislative body or other governing board or body of the political subdivision authorizes such employment by ordinance, resolution or local law."

Directing our attention to section 63, in so far as it applies to harness racing, we find that paragraphs (a) through (c) set up the following prohibitions as to public officers, public employees and party officials. Paragraph (a) is a complete prohibition on holding a license. Paragraph (b) prohibits the ownership or holding of a proprietary interest in a firm, association or corporation doing certain things in connection with pari-mutuel racing as follows: (1) conduct such racing; (2) conduct its occupation, trade or business at such a race meet; (3) own or lease such a race track and (4) manage such a race track.

Paragraph (c) prohibits the holding of any office or employment with any firm, association or corporation falling in these four last-described categories. The prohibition of paragraph (c) was relaxed by subdivision 6 to the extent that it was made inapplicable to a public employee of a political subdivision (with certain stated exceptions) whose compensation is less than $5,000 per annum if the appropriate local legislative body authorizes such employment by suitable enactment.

The intent of the Legislature in adopting these laws becomes plain in the light of the history of the licensing statutes applicable to the two racing commissions. There was first imposed a blanket prohibition on licensing public employees. It was apparent, however, that there were many race track jobs for which no license was required or licensing by the commission was permissive. Therefore, the Legislature in effect said that public employees may not hold office or be employed by a firm or corporation that had a proprietary interest in (1) a track, (2) a business conducted at a track, (3) a landlord of a track or (4) the management of a track. However, if the compensation of such public employee was less than $5000 and he had the approval of his public employer, then he might be employed by an employer falling in one of the four stated categories.

Moreover, if for reasons of convenience the Commission determined not to license certain employees of employers described in clauses (1) through (4) of paragraph (b), the prohibition of paragraph (c) would still preclude public employees from accepting such employment. (cf. L. 1954,

c. 510, §5, the provisions of which authorized the fingerprinting of race track employees in the absence of licensing.) Conversely, all those persons who are or might fall within the prohibition of paragraph (a) are not within the prohibition of paragraph (c). As the title of Section 41-a indicates, licenses are divided into two categories—those for "participants" and those for "employees." The statute lists "drivers" as participants and the administrative rules of the Harness Racing Commission, Rule 4, Subdivision (b), lists participants as "owner, driver, trainer, assistant trainer or groom." The persons so enumerated do not fall within the prohibition of paragraph (c) because they are not employed by a business enumerated in clauses (1) to (4) of paragraph (b). An owner is clearly not an employee of anyone. Similarly, drivers, trainers, assistant trainers or grooms, who are employees of an owner, are not employees of a business enumerated in clauses (1) through (4) of paragraph (b) since an owner is not within the enumerated activities of those clauses and for the further reason that an owner is not a "firm, association or corporation" within the meaning of that paragraph.

Directing our attention to the petitioner, we find that he is a public employee receiving a compensation of more than $5000 annually and prior to 1954 he was employed as a mutuel clerk at a harness race track by a corporation which was licensed by the Commission to conduct pari-mutuel racing. Chapter 514 of the Laws of 1954 when enacted contained two prohibitions that prevented him from obtaining a license. First, the absolute prohibition of paragraph (a) of subdivision 1 of section 63, and second, by the in-

direct prohibition of paragraph (c) thereof because he was employed by a corporation licensed to conduct pari-mutuel racing as provided in paragraph (b) (1) of subdivision one of the same section. Section 6 could give him no relief because his annual compensation was in excess of $5000.

In 1955 the Legislature further amended section 63 by adding a new subdivision, numbered 7. (L. 1955, c. 815.) It is upon this amendment that petitioner relies in his present proceeding to compel the issuance of a license. The amendment is as follows:

> "7. The provisions of paragraph (a) of subdivision one of this section shall not bar a public officer, public employee or party officer from holding any license issued by the state racing commission or the state harness racing commission if he was qualified to hold such a license on or prior to April sixth, nineteen hundred fifty-four."

It is the contention of petitioner, and Special Term so held, that it was the intent of the Legislature in the enactment of this subdivision to lift entirely the restrictive provisions imposed by section 63 upon a public employee, public officer or party officer; that having withdrawn the prohibition against the issuance of a license to such persons without restraint or limitation in paragraph (a) the Legislature intended to withdraw the restriction of paragraph (c) against the issuance of a license to such persons. We are unable to agree with these conclusions.

In the first place, subdivision 7 afforded relief to certain categories of public employees separate and apart from the category of petitioner. Thus, employees of munici-

palities, who were previously qualified for the benefits of subdivision 6, are now permitted to accept employment with an employer described in clauses (1) through (4) of paragraph (b) although the commission might require a license. Thus, let us assume that a public employee earning $3000 annually was employed at the track as a salesman of soft drinks. He fell within the protection of subdivision 6 because his salary was less than $5000 and his public employer by ordinance had authorized his employment at the track. If prior to the enactment of subdivision 7 the commission had decided to require a license for this type of work, he could not have received a license by reason of the prohibition in paragraph (a) of subdivision one. Thus, the enactment of subdivision 7 removed the actual or potential prohibition of paragraph (a) as to those persons already exempt from the provisions of paragraph (c).

The more significant effect of subdivision 7 was to lift the prohibition of paragraph (a) in its entirety as it applied to owners, drivers and other "participants". As heretofore pointed out, the statute and rules of the Harness Racing Commission make a clear distinction between participants and employees. Contrary to the contention of the petitioner, participants do not fall within the provisions of paragraph (b) of section 63, which is applicable only to a proprietary interest in a firm, association or corporation. It seems clear, as heretofore more fully discussed, that an owner is not an employee of anyone. Similarly, drivers, trainers and grooms may be employees of an owner but they are not employees of firms, associations

or corporations as described in paragraph (b) and therefore do not fall within the prohibition of paragraph (c). This is made even clearer when considered in the light of the statutory provisions relating to flat racing. The State Racing Commission may license natural persons only as owners. (L. 1926, c. 440, §9-b, as added L. 1934, c. 310, §5, as amended.) Even if one strained to construe paragraph (b)(2) to mean that an owner conducts his occupation at a race track, he is excluded from the provisions of the paragraph because it relates only to a "firm, association or corporation" and obviously a natural person is none of these.

It thus appears that a real benefit was bestowed upon public officials, public employees and party officials in certain areas by the enactment of subdivision 7. To state it concretely, a Sheriff of a county or the chairman of a political party may now hold a license as an owner. A county Supervisor may hold a license as a trainer and an employee of a public highway department may be licensed as a groom. As to them, and those similarly situated, the ban has been lifted.

We have so far been considering the impact of subdivision 7 on harness racing. It should be pointed out, however, that the subdivision granted substantial relief to certain areas of flat racing. It has been heretofore set forth that from 1934 to 1951 the Jockey Club and since 1951 the State Racing Commission have been mandated by the Legislature to license owners, trainers, jockeys and certain other participants. The 1954 enactment of section 63, subdivision 1, paragraph (a), barred public officials,

public employees and party officials from holding such licenses at flat tracks. The 1955 amendment, adding section 7, removed the ban if such persons were qualified to hold a flat track license as a participant prior to April 6, 1954. This gives real sense and meaning to the amendment because, as heretofore discussed, owners must be natural persons and they and their employees constitute a class separate and distinct from employees of firms, who own or manage a track, or, conduct pari-mutuel racing or a business or occupation at a race track.

The pattern of prohibition set down in section 63 in its present form may not commend itself to clarity but, contrary to the contention of petitioner, an absurd intent is not found in the 1955 amendment. We accept what is undenied—that petitioner is a decent, law-abiding citizen holding a responsible position in a school system in Nassau County. But this racing legislation was not aimed at him and those similarly situated. On March 15, 1954, the Governor sent a message to the Legislature in which some of the findings of the Moreland Commission were reviewed with particular reference to political ownership of race track stock. It was proposed that public officers and employees and political leaders be barred from owning any interest in a racing association licensed to conduct pari-mutuel meetings at harness tracks and running tracks. It was further proposed that such persons be prohibited from selling goods or services to any licensed racing association.

As we have seen, the Legislature, by chapters 510 through 515 of the Laws of 1954, adopted even more stringent prohibitions than those contained in this proposal.

The category of described persons was prohibited from holding any license from either commission and from holding any office or employment with any firm, association or corporation having a proprietary interest in a track, a business conducted at a track, the owner of a track or the management thereof. The intent of the Legislature in adopting the latter provision is not difficult to ascertain. In effect, the Legislature said that not only were public officers, public employees and political leaders barred from having a proprietary interest in a race track or its operation but such owners and operators after the purge were barred from doling out jobs to those in the marked group. This is the group in which petitioner finds himself and as to this group the prohibition has not been lifted. Moreover, the Legislature apparently determined that an exception should be made under certain conditions as to local public employees whose annual salary was less than $5,000. Information may have been before the lawmakers that, for the most part, this group obtained employment in minor jobs at a track and generally their influence in public life was not such as to be of value or assistance to the track owners and operators.

On the other hand, the Legislature in 1955 may well have determined that as to participants, such as owners of horses, trainers and grooms, no reason existed for continuing the prohibition against public officials, public employees and party officials. In addition, the Legislature may have determined to insure that persons already benefited by subdivision 6 of section 63 would not be prohibited from working at a track because the Commission might require licenses for such employment.

There thus emerges a pattern which the Legislature has deliberately set out in something less than a clear manner in subdivisions 1, 6 and 7 of section 63. The petitioner, who earns $6,700 a year, is now barred from employment as a pari-mutuel clerk by the prohibition of paragraph (c) although the prohibition of paragraph (a) has been lifted by subdivision 7. Moreover, the petitioner is not affected by subdivision 6 because his salary exceeds $5000 and there is no proof that his public employer has authorized his employment as a mutuel clerk. If, as petitioner contends, subdivision 6 is unconstitutional because it is unreasonable or fails to provide equal protection, the effect would be to invalidate chapter 515 of the Laws of 1954. Paragraph (c), which is the provision of law precluding petitioner from obtaining a license, was enacted in chapter 514 of the Laws of 1954. Accordingly, the petitioner, not being aggrieved thereby, lacks the standing to challenge the constitutionality of chapter 515 of the Laws of 1954.

The order appealed from should be reversed and the petition dismissed.

ALL CONCUR

Opinion of Supreme Court, New York County

(208 Misc. 1047)

MARKOWITZ, *Justice.*

This is an Article 78 proceeding whereby petitioner seeks a review of respondent's refusal to accept petitioner's application for a license as a mutuel clerk at Roosevelt Raceway. The application was rejected by the respondent upon the determination that Section 63 of the Pari-Mutuel Revenue Act, Unconsol. Laws, §7615, as added by Chapter 514, and amended by Chapter 515 of the Laws of 1954 were applicable and required such rejection. Petitioner further seeks the judicial direction of this court to the respondent to accept said application and to issue the requested license. It appears from the record before me that petitioner is a discharged veteran, has been and is now regularly employed as a school teacher in Nassau County since 1949 (except for the period of his service in the United States Navy). He is a physical education teacher and his hours of service are in the morning and early afternoons. His salary is in excess of $5,000 per annum. Roosevelt Raceway is a track operated during the evening hours in Nassau County, under a license from the respondent for harness racing and conducts mutuel betting operations in connection therewith sanctioned by law. The petitioner has been employed at said Roosevelt Raceway as a mutuel clerk during the years from 1947 to 1953, except during such period of time when he was serving in the Navy. As a mutuel clerk his duties were to sell tickets to the public at the track and to cash winning tickets. Such duties were entirely ministerial and menial requiring no special skill or training nor requiring the performance of any executive.

directional or discretionary acts. It appears that public employees in the past have constituted substantially less than 10% of all of the mutuel clerks employed at the track. Prior to May 1, 1954, no license for such employment was required. Petitioner has never held any license from the respondent Commission although it appears that except for the statutory prohibition against the employment of public employees, petitioner in all respects was and is a person qualified to hold a license as a mutuel clerk prior to April 6, 1954. It appears and is not contradicted that his duties as a mutuel clerk in no way interfere with nor conflict with or in any wise affect the performance of petitioner's employment and duties as a teacher.

By Chapter 254 of the Laws of 1940, harness racing and mutuel betting in connection therewith was authorized. It was not until the year 1954 when, in the light of the Moreland Commission exposures involving the operation of the race tracks and the ownership of their proprietary stock, drastic regulations were adopted by the Legislature in an attempt to cure the situation. Section 63, subdivision 1 of the Pari-Mutuel Revenue Law was enacted which provided, so far as the proceedings herein are concerned, that public officers and public employees who earned more than $5,000 per year and party officers were barred from holding any license from the Racing Commission or the Harness Racing Commission, subd. 1, para. (a); subd. 3, paras. (a) and (b), and also were barred "from holding any office or employment with any of the above mentioned corporations or associations (subd. 1[c])". In view of the foregoing petitioner did not apply for a license from the respondent

Commission in 1954. By this statute, the right of public employees to perform minor menial work at a harness track, such as performed by petitioner, was severely circumscribed and, in the case of a public employee earning more than $5,000 per year, entirely prohibited through a denial of a license required to permit the hiring of a public employee by the operator of the track. It is interesting and significant to note that in all of the disclosures, not a single derogatory word was contained in the Moreland Commission's Report nor a single improper act uncovered involving a public employee serving as a mutuel clerk.

Subsequently, by the adoption of subdivision 6, Chapter 515, Laws of 1954, the severity of the statute was immediately softened. That provision reads as follows:

> "6. The provisions of paragraph (c) of subdivision one of this section shall not apply to a public employee of a political subdivision (other than a police officer or paid employee of a police department, sheriff's office, district attorney's office or other law enforcement agency) whose compensation is less than five thousand dollars per annum if the local legislative body or other governing board or body of the political subdivision authorizes such employment by ordinance, resolution or local law. L. 1940, c. 254, para. 63, as added, L. 1954, c. 514, para. 1, eff. May 1, 1954; amended L. 1954, c. 515, eff. May 1, 1954."

In 1955, by Chapter 815, subdivision 7 was added to said section 63 which reads as follows:

> "* * * *the provisions of paragraph* (a) of subdivision one of this section shall not bar a public

officer, public employee or party officer from holding any license issued by the state racing commission or the state harness racing commission if he was qualified to hold such a license on or prior to April sixth, nineteen hundred fifty-four."

The effect therefore, of the addition of this subdivision 7, was to repeal the prohibition against the granting of a license to a public officer, public employee or party officer. Respondent contends that since subdivision (c) was not expressly repealed, a public employee earning more than $5,000 per year is still barred from employment at a harness track and since a license would be meaningless, none should issue.

My study of the statutes involved and the history of the legislation leads me to the ultimate conclusion that petitioner has a clear right to the issuance of the license requested and that the position taken by respondent is contrary to the intent and purposes of the controlling statutes aforestated. There can be no dispute that petitioner is a person fully qualified to be licensed as a mutuel clerk prior to April 6, 1954. He had served in that capacity from 1947 to 1953. When section 63 was enacted in 1954, petitioner and the small group of other public employees similarly situated did not apply for a license for employment as a mutuel clerk because the statute prohibited such public employees from obtaining a license and prohibited them, subd. 1, para. (c), from accepting employment from the association. Subdivision 2 of section 63 aforestated provided that the acceptance of employment without a license at a race track licensed by the respondent Commission con-

stituted a forfeiture of the public employment. However, the subsequent enactment of subdivision 7, Laws of 1955, ch. 815, entirely changed the situation because it specifically provided that if a person were qualified prior to April 6, 1954, to hold a license, he was no longer barred because he was a public employee. I am therefore persuaded and of the opinion that at the present time no statutory prohibition exists against the granting of a license to petitioner merely because he is a "public employee". I hold as untenable and without logical force or merit respondent's contention that the enactment of said subdivision 7 did not remove the prohibition contained in paragraph (c).

It appears that the obvious intent of the Legislature, in removing the statutory prohibition against the issuance of a license to public employees, was to permit them to obtain such license and that the persons obtaining such license could naturally use them. While it may be argued that the intent of the amendment was to permit the issuance of a license to a public employee, public officer or party officer for the purpose of doing something other than that contained in subd. 1, paras. (b), (c) and (d), it nevertheless is apparent that there is not one single activity involved in the operation of a race track which is not within the condemnation of said paragraphs (b), (c) and (d). Certainly one who races or trains horses, conducts an occupation, trade or business at the race track in order to seek income in the form of a purse or a prize for a successful effort. Whatever the activity may be, if it is conducted at the race track with the consent, permission or cooperation of the Association, it must come within the prohibition contained in the aforementioned paragraphs (b), (c) and (d).

[1–4] After a thorough consideration of the statutes involved in this application and of the background for their enactment, it is clear that the approach to the application of these statutes must be a reasonable one; a reasonable interpretation must be made in order that the law be fairly construed to give force to the entire act and not through an injustice or inequality in its application. This expression finds support in such cases as People ex rel. Washburn v. French, 52 Hun 464, 5 N. Y. S. 712; Holy Trinity Church v. United States, 143 U. S. 457, 12 St. Ct. 511, 36 L. Ed. 226; People ex rel. Wood v. Lacombe, 99 N. Y. 43, 1 N. E. 599. Manifestly, we must look to the act as a whole and to the subject with which it deals for the reason and spirit of the enactment and thereby determine the true legislative intent and purpose. I am of the ultimate conclusion that it was the intent and purpose of the Legislature in the enactment of subdivision 7 to lift entirely the restrictive provisions imposed by section 63 upon a public employee and those similarly situated; otherwise the Legislature could have added to the language of subdivision 7 those categories to which a prohibition against the issuance of a license continued. For example, the Legislature could have added that no license could be issued to an owner, driver, a mutuel clerk, a steward or other track official who was a public employee. Having categorically withdrawn the prohibition against the issuance of a license to a public officer, a public employee or a party officer without restraint or limitation, the conclusion is inescapable, in my opinion, that the Legislature intended to withdraw the restriction against the issuance of a license to such person. I am further influenced in my determination that the numerous arbitrary exclu-

sions were not intended by the Legislature because there appears to be no logical reason to exclude all state employees, if city, county and local employees earning less than $5,000 per annum are exempt from such exclusion. If the reasoning behind the present laws is sound, as urged by respondent, then it becomes somewhat absurd when we find that there is no limitation whatsoever imposed upon federal employees or public service employees of neighboring states. As pointed out in the affidavit of Mr. Fosner, Manager of the Office of Personnel of the Roosevelt Raceway, who appears herein as amicus curiae, approximately 50 public service employees who have had creditable employment records at Roosevelt Raceway prior to 1954 have have been prohibited from returning to their supplementary seasonal part-time employment because of the severe restrictions imposed upon them by the aforementioned statutes. It is also pointed out that public service employees previously employed by various concessionaires and contractors are not included in the foregoing estimate. Among the public service employees excluded by the law, as interpreted by respondent, from returning to their positions at the Roosevelt Track are school teachers, clerks, court attendants of the Supreme and Surrogate's Court, employees of the Fire Department, Board of Education, Labor Department, Motor Vehicle Bureau, etc., as well as all state employees and employees of local subdivisions earning more than $5,000 per annum. It seems apparent that a curtailment and barring of this type of personnel was not intended in the enactment of the laws herein discussed. It is obvious that the continuation of this type of personnel in the employment of the tracks is neither harmful nor

detrimental to racing. As hereinbefore pointed out, no breath of scandal has been mentioned or attributed to any of this type of personnel employed at the race track.

For all of the foregoing reasons, I find and conclude that the determination of the respondent was arbitrary and capricious; that the respondent misinterpreted the effect of the amendment enacted by Chapter 815 of the Laws of 1955, and that petitioner, being a qualified person within the provisions of section 63 of the Pari Mutuel Revenue Law, is entitled to the issuance of the license applied for, and that the respondent is hereby directed to issue such license to the petitioner.

In view of this disposition, I do not feel that further consideration of the argument raised in respect of the constitutionality of the statutes in question need be considered, and that question is therefore not determined here.

[5] The cross-motion of respondent to dismiss the petition, on the ground that the application is premature and petitioner has failed to exhaust his remedies before the respondent commission, is denied. It appears that the respondent commissioner here did not refuse to grant petitioner a license, but that he refused to even accept petitioner's application. The present proceeding seeks to compel the commissioner to accept the application and for an order directing him to issue the license as a ministerial act. Since petitioner is qualified under the law and entitled to a license as a mutuel clerk, there is no discretionary power in the respondent to refuse him the license upon the grounds stated by the respondent commission in its inter-

pretation of the law. There is no factual dispute here and the sole question involved is one as to the interpretation of the applicable statutes.

Settle order on or before August 11, 1955, on one day's notice.

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment 14, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Session Laws of New York

Chapter 391—1953

Pari-Mutuel Revenue Law Section 41-a
Unconsolidated Laws 7599-a

§41-a. LICENSES FOR PARTICIPANTS AND EMPLOYEES AT HARNESS RACE MEETINGS.

1. For the purpose of maintaining a proper control over harness race meetings conducted pursuant to this act, the state harness racing commission may license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe, including, if the commission deem it necessary so to do, owners, and some or all persons exercising their occupation or employed at harness race meets. The state harness racing commission may by rule fix the license fees to be paid by persons or corporations so licensed, provided that such occupational license fees so fixed shall not exceed ten dollars, which fees shall be paid to the commission and by it paid to the department of state and be paid by the department into the state treasury. All such licenses, unless revoked for cause shall be for the period of one year from April first of the year in which the same shall be issued. The commission may employ such officers, agents or employees as it may deem necessary to carry out this licensing function and fix their compensation. The applications for licenses shall be in writing in such form as the commission may prescribe, and contain such information as the commission may require.

2. If the state harness racing commission shall find that the experience, character and general fitness of the appli-

cant are such that the participation of such person in harness horse race meets will be consistent with the public interest, convenience or necessity and with the best interests of racing generally in conformity with the purposes of this act, it shall thereupon grant a license.

The commission may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to this section, if it shall find that the applicant, (a) has been convicted of a crime involving moral turpitude; (b) has engaged in bookmaking or other forms of illegal gambling; (c) has been found guilty of any fraud or misrepresentation in connection with racing, breeding or otherwise; (d) has been found guilty of any violation or attempt to violate any law, rule or regulation with respect to racing in any jurisdiction for which suspension from racing might be imposed in such jurisdiction; (e) or who has violated any rule, regulation or order of the commission.

3. No license shall be revoked unless such revocation is at a meeting of the state harness racing commission on notice to the licensee, who shall be entitled to a hearing in respect of such revocation and to be represented by counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by and subject to the provisions of article seventy-eight of the civil practice act.

Session Laws of New York
Chapter 696—1954
Enacted April 14, 1954
Effective January 1, 1955

Public Officers Law Section 74

§74. Code of Ethics.

1. Definition. As used in this section: The term "state agency" shall mean any state department, or division, board, commission, or bureau of any state department.

The term "regulatory agency" shall mean the banking department, insurance department, state liquor authority, department of agriculture and markets, department of state, department of public service and department of labor.

The term "legislative employee" shall mean any officer or employee of the legislature but it shall not include members of the legislature.

2. Rule with respect to conflicts of interest. No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

3. Standards.

a. No officer or employee of a state agency, member of the legislature or legislative employee should accept other

employment which will impair his independence of judgment in the exercise of his official duties.

b. No officer or employee of a state agency, member of the legislature or legislative employee should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

c. No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

e. No officer or employee of a state agency should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

g. An officer or employee of a state agency should abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest.

h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

i. No officer or employee of a state agency employed on a full-time basis nor any firm or association of which such an officer or employee is a member nor corporation a substantial portion of the stock of which is owned or controlled directly or indirectly by such officer or employee, should sell goods or services to any person, firm, corporation or association which is licensed or whose rates are fixed by the state agency in which such officer or employee serves or is employed.

j. If any officer or employee of a state agency, member of the legislature or legislative employee shall have a financial interest, direct or indirect, having a value of ten thousand dollars or more in any activity which is subject to the jurisdiction of a regulatory agency, he should file with the secretary of state a written statement that he has such a financial interest in such activity which statement shall be open to public inspection. Added L1954, c. 696, eff. Jan. 1, 1955.

Session Laws of New York

Chapter 514—1954

Pari-Mutuel Revenue Law Section 63
Unconsolidated Laws Section 7615

AN ACT to amend the pari-mutuel law, in relation to the prohibition of financial and other interests in pari-mutuel racing and related activities by public officers and employees and party officers

Became a law April 6, 1954, with the approval of the Governor. Passed, by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter two hundred fifty-four of the laws of nineteen hundred forty, constituting the pari-mutuel revenue law, is hereby amended by adding thereto a new section, to be section sixty-three, to read as follows:

§63. Prohibition of Interest by Public Officers, Public Employees and Party Officers in Pari-mutuel Racing Activities.

1. No public officer, public employee or party officer shall:

(a) hold any license from the state racing commission or the state harness racing commission; or

(b) own or hold, directly or indirectly, any proprietary interest, stock or obligation of any firm, association or corporation (1) which is licensed by either of such com-

missions to conduct pari-mutuel racing, or (2) which is licensed to conduct its occupation, trade or business at race tracks at which pari-mutuel race meets are conducted, or (3) which owns or leases to any licensed association or corporation a race track at which pari-mutuel racing is conducted, or (4) which participates in the management of any licensee conducting pari-mutuel racing; or

(c) hold any office or employment with any firm, association or corporation specified in paragraph (b) of this subdivision; or

(d) sell (or be a member of a firm, or own ten per centum or more of the stock of any corporation, which sells) any goods or services to any firm, association or corporation specified in paragraph (b) of this subdivision.

2. Notwithstanding any other provision of law, and in addition to any other cause of removal provided by law, a knowing and wilful violation of this section shall be cause for removal from public office, public employment or party office. In any such case, such public officer, public employee or party officer violating this section shall be removed from office by appropriate authority having the power of removal or at the suit of the attorney-general.

3. As used in this section, the following terms shall mean and include:

(a) Public officer. Every state and local officer as defined in section two of the public officers law who is required to devote all or substantially all of his time to the duties of his office for which he receives compensation, or if em-

ployed on a part time or other basis receives compensation in excess of five thousand dollars per annum, a member or officer of the state legislature, a member or officer of the state racing commission or the state harness racing commission, or a member or officer of a local legislative body.

(b) Public employee. Every person employed by the state or any municipality or other political subdivision thereof or by a local legislative body (other than a public officer defined in paragraph (a) of this subdivision) who is required to devote all or substantially all of his time to the duties of his employment for which he receives compensation, or if employed on a part time or other basis receives compensation in excess of five thousand dollars per annum, or an employee of the state legislature.

(c) Party officer. The following members or officers of any political party:

(1) A member of a national committee;

(2) A chairman, vice-chairman, secretary, treasurer or counsel of a state committee, or member of the executive committee of a state committee;

(3) A county leader, chairman, vice-chairman, counsel, secretary or treasurer of a county committee.

(d) Local legislative body. The board of supervisors of a county; the council, common council or board of aldermen and the board of estimate, the board of estimate and apportionment or board of estimate and contract, if there be one, of a city; and the town board of a town.

4. A public officer, public employee or party officer who owns or holds, directly or indirectly, any proprietary interest, stock or obligation prohibited by subdivision one of this section on May first, nineteen hundred fifty-four, shall not be in violation of this section if such interest or obligation is disposed of within one year from the date this act takes effect.

5. The state racing commission and the state harness racing commission shall have the power to refuse to grant or to revoke or suspend a license of any firm, association or corporation which aids or knowingly permits or conspires to permit any public officer, public employee or party officer to acquire or retain any interest prohibited by this section.

§2. This act shall take effect May first, nineteen hundred fifty-four.

Session Laws of New York

Chapter 515—1954

Pari-Mutuel Revenue Law Section 63
Unconsolidated Laws Section 7615

AN ACT to amend the pari-mutuel revenue law, in relation to the prohibition of certain public employees from pari-mutuel racing activities.

Became a law April 6, 1954, with the approval of the Governor. Passed, on message of necessity, pursuant to article III, section 14 of the Constitution, by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section sixty-three of chapter two hundred fifty-four of the laws of nineteen hundred forty, constituting the pari-mutuel revenue law, as added by a chapter of the laws of nineteen hundred fifty-four, is hereby amended by adding thereto a new subdivision to be subdivision six to read as follows:

6. The provisions of paragraph (c) of subdivision one of this section shall not apply to a public employee of a political subdivision (other than a police officer or paid employee of a police department, sheriff's office, district attorney's office or other law enforcement agency) whose compensation is less than five thousand dollars per annum if the local legislative body or other governing board or body of the political subdivision authorizes such employment by ordinance, resolution or local law.

§2. This act shall take effect May first, nineteen hundred fifty-four.

Session Laws of New York

Chapter 815—1955

Pari-Mutuel Revenue Law Section 63
Unconsolidated Laws Section 7615

AN ACT to amend the pari-mutuel revenue law, in relation to clarifying the application of section sixty-three thereof to certain interests of public officers, public employees and party officers in pari-mutuel racing activities.

Became a law April 29, 1955, with the approval of the Governor.

Effective April 29, 1955.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section sixty-three of chapter two hundred fifty-four of the laws of nineteen hundred forty, constituting the pari-mutuel revenue law, is hereby amended by adding thereto a new subdivision, to be subdivision seven, to read as follows:

7. The provisions of paragraph (a) of subdivision one of this section shall not bar a public officer, public employee or party officer from holding any license issued by the state racing commission or the state harness racing commission if he was qualified to hold such a license on or prior to April sixth, nineteen hundred fifty-four.

§2. This act shall take effect immediately.

Session Laws of New York

Chapter 1036—1957

Pari-Mutuel Revenue Law Section 63
Unconsolidated Laws Section 7615

AN ACT to amend the pari-mutuel revenue law, in relation to the prohibition of certain public employees from pari-mutuel racing activities.

Became a law April 28, 1957, with the approval of the Governor. Passed, by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision six of section sixty-three of chapter two hundred fifty-four of the laws of nineteen hundred forty, constituting the pari-mutuel revenue law, as added by chapter five hundred fifteen of the laws of ninteen hundred fifty-four, is hereby amended to read as follows:

6. The provisions of paragraph (c) of subdivision one of this section shall not apply to a public employee of a political subdivision (other than a police officer or paid employee of a police department, sheriff's office, district attorney's office or other law enforcement agency) whose compensation is less than [five] six thousand dollars per annum [if the local legislative body or other governing board or body of the political subdivision authorizes such employment by ordinance, resolution or local law], *provided, however, that such employment of employees of a political subdivision may be prohibited by ordinance, reso-*

lution or local law adopted by the local legislative body or other governing board of such political subdivision.

§2. This act shall take effect May first, nineteen hundred fifty-seven.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

This statute amended subdivision 6 of Section 63 principally by increasing the salary limitation from $5,000 to $6,000. It was enacted April 28, 1957, which was after this litigation was started and is reproduced here that this Court may have the complete picture; and particularly to emphasize the respondent's persistent insistence, that solely the public salary may be made the basis for classifications of public employees without being discriminatory and invalid.

Petitioner respectfully submits this amendment does not cure but actually emphasizes and compounds the constitutional infirmity of Section 63 in so far as it denies to petitioner his mutuel clerk's license; and judicial intervention appears the only solution.

Governor's Message of March 15, 1954

FOR IMMEDIATE RELEASE

HARRY J. O'DONNELL, EXECUTIVE ASSISTANT TO THE GOVERNOR

STATE OF NEW YORK
EXECUTIVE CHAMBERS
Albany

March 15, 1954

TO THE LEGISLATURE:

I wish to lay before you my views and recommendations concerning the ownership or participation by public and party officers in racing associations.

After 23 years in public life I am more convinced than ever that commercialized gambling is contrary to sound public policy and can only have results which are injurious to the public interest. I previously presented my views on this subject in a Special Message to your Honorable Bodies on January 16, 1950, at a time when the then Mayor of New York City proposed a wide extension of legalized gambling. This has been tried repeatedly in this country over the last 200 years with undesirable consequences in all cases.

Gambling at race tracks, however, has been legal in this State since the people approved an amendment to the Constitution in 1939 authorizing pari mutuel betting, from which the State was to derive revenue. The following year, in 1940, the Legislature enacted bills authorizing pari-mutuel betting at both harness and running races and the then Governor approved them.

The harness racing law was drawn to regulate a rural sport which had known its greatest vogue at county fairs. It established a commission of three members to grant licenses and supervise the conduct of races. The commission appointed by Governor Lehman consisted of two Democrats and one Republican. These were all men of good repute and were continued in office by me until they died or resigned.

The members of the Commission served on a part-time, unpaid basis with an office staff consisting of three persons. They had no power over labor relations, transfers of stock, concessions or leasing arrangements, nor did they exercise the functions of a police or law-enforcement agency.

During the war years the tracks were generally unprofitable and some faced bankruptcy, their stock being available at nominal prices. With the end of the war and the introduction of night racing and the starting-gate, legalized betting at harness races soared. Betting rose from 7 million in 1941 to $272 million last year.

On August 28, 1953, the murder of a union official, representing employees at one race track, led to the disclosure of labor racketeering at the two tracks in the New York metropolitan area. In addition, there was a disclosure that some undesirable persons had acquired stock interests in certain tracks. It was also disclosed that political officers of both major parties had stock interests in the tracks.

On October 8, 1953, I appointed a Moreland Act Commission of distinguished citizens to examine every aspect of harness racing. That commission has since conducted an

inquiry into all phases of the sport and placed the facts on the public record under oath.

In a message to your Honorable Bodies I have already proposed drastic regulatory powers to be conferred upon a full-time, salaried commissioner and substantial increases in the State's share of the revenue from pari-mutuel betting. I have also dealt with the labor racketeering and have proposed measures which I trust will prevent its recurrence.

There remains the question of financial interest in race tracks by political officers.

In issuing a license for a race track, the State grants an unique and often valuable monopoly. The number of licenses and the share of pari-mutuel revenues are fixed by law.

Because such ventures are directly dependent upon the State for their existence and their income, participation by political officers involves the risk of conflict of interests.

Licenses issued to harness tracks are in no way comparable to the franchises enjoyed by railroads, electric power companies, or other public utilities because each is in an established business of great stability, and government can feasibly regulate the rate of return on investment. The same fundamental difference exists with respect to licenses granted by government where it has no control over revenues, as in the case of liquor stores, radio stations, television stations and commercial banks.

Licenses to race tracks are unique in the entire field of government.

The work of the Moreland Commission shows the problems inherent in this situation. The harness racing law of 1940 imposed no restrictions on the ownership of stock by any person. Not even the members, officials or employees of the Harness Racing Commission were barred from owning interests in tracks. The wife of one of the original members of the Commission was shown to have acquired stock in a track which was licensed while her husband was chairman of the Commission. The first Secretary of the Commission, who served from 1940 to 1945, acquired a stock interest in another track while he was Secretary.

The testimony shows that in 1940, soon after the harness racing law was enacted, 75% of the stock of a track was acquired with funds of the then Democratic leader in the Assembly.

Not long after, the Democratic leader in the State Senate who co-sponsored the legislation, obtained a half interest in a harness track which members of his family now wholly own.

There was no party monopoly in this field.

The Republican who co-sponsored the legislation in the Assembly later acquired substantial harness track stock holdings. Four Republican County Chairman, other former members of the Legislature and political leaders of both parties were shown to have acquired interests in licensed tracks. Some profited greatly as the value of the stock increased.

The Moreland Commission has found that on August 28, 1953, a total of 65% of all the stock in harness racing associations and their affiliates was held by the general public: 19% by persons who have at some time held political office as Republicans, members of their families, their attorneys or agents, and 16% by persons who have at some time held political office as Democrats, members of their families, their attorneys or agents.

In making the drastic recommendations which follow, I recognize that no present member of the Legislature has been found to own race track stock and that out of the 70,000 employees of the administrative branch of the State government, only three were found to own any such stock. Conceding the legality of the ownership of race track stock by anyone, it seems to me that so long as political ownership is possible, there will always remain the opportunity of political influence for private gain. This possibility should be removed for all time to come.

I propose that public officers and employees, both in State and local government, members of the Legislature and legislative employees and political leaders be barred from owning any interest, direct or indirect, in a racing association licensed to conduct pari-mutuel meetings. This should include both the harness tracks and the running tracks. A reasonable time should, of course, be allowed for disposal of any existing interest.

I propose further that such public officers and employees and party leaders be prohibited from selling goods or services to any licensed racing association.

Governor's Message of March 15, 1954

We in government are the trustees of the hopes of the people we represent and of their faith in free government. Your enactment of these recommendations will be an eloquent restatement of our devotion to the concept that public office is in every respect a public trust.

(Signed) THOMAS E. DEWEY

NOV 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term 1957

No. 521

In the Matter of the Application

of

WILFRED DANIEL MURTHA,

Petitioner-Appellant.

—against—

GEORGE P. MONAGHAN, Commissioner of the Harness Racing Commission of the State of New York,

Respondent-Respondent,

for an order annulling a determination of said respondent denying petitioner's application for a license as a mutuel clerk and for a further order directing said Commission to forthwith issue such license, pursuant to Article 78, C.P.A.

PETITIONER'S REPLY BRIEF

DAVID M. MARKOWITZ
Attorney for Petitioner
261 Broadway
New York City

MICHAEL J. GAYNOR
Westbury, L.I. N.Y.
18 Carle Road
of Counsel

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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PETITIONER'S REPLY BRIEF

It scarcely seems necessary to point out that respondent's brief in opposition to the petition herein wholly overlooks the real question presented. This Court is not

asked to pass upon the "wisdom" of a "very limited experiment in 'home rule'" as stated on page 8 of the respondent's brief, but upon the constitutionality of a statute which prohibits some public employees from engaging in an entirely proper and legal outside activity, duly licensed by the State, which involves no conflict of interest and in no way interferes with the proper performance of his public duties. It is the power of the State Legislature that is challenged; the question presented is the reasonableness of the statute (in the light of the Fourteenth Amendment), not its wisdom (which of course this Court would not be expected to pass upon). Petitioner contends that the enactment unreasonably discriminates against a class within a class.

The personal, individual rights of petitioner and many others are vitally affected. This Court has very recently consented to review on the merits a decision of the New York Court of Appeals upholding the validity of a statute pursuant to which a public employee (a subway conductor) was discharged for invoking the Fifth Amendment (*Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, cert. granted Oct. 14, 1957, (No. 165).

At no point during this litigation has there been any dispute as to the facts. A pure question of law is presented.

All the issues are before this Court on this application. Summary reversal to the end of a final determination is respectfully urged inasmuch as the decision below, based on undisputed facts and predicated on unsound principles of law, is so clearly erroneous as to make argument before the court a waste of time. See: *Palermo* v. *Luckenbach*

Steamship Company, Inc. (No. 350) Decided October 21, 1957; *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843.

Respectfully submitted

DAVID M. MARKOWITZ
Attorney for Petitioner
261 Broadway
New York City

MICHAEL J. GAYNOR
18 Carle Road
Westbury, Long Island,
New York
of Counsel

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS J. LEFKOWITZ
Attorney for Respondent-Respondent
Attorney General of the
State of New York
80 Centre Street
New York 13, New York

JOHN R. DAVISON
Solicitor General

DANIEL M. COHEN
Assistant Attorney General
Of Counsel

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the respondent-respondent, George P. Monaghan, the Commissioner of the Harness Racing Commission of the State of New York, by his counsel of record, and opposes the petition herein and asks that the same be denied.

Statement of the Case

Petitioner, Wilfred Daniel Murtha, seeks a writ of certiorari to the Court of Appeals of the State of New York "to review an order of that court, made July 3, 1957", which denied petitioner's motion for reargument and granted his motion to amend that Court's remittitur, dated January 10, 1957, to add thereto a statement that, in passing upon petitioner's appeal, the Court of Appeals had held that his rights under the Fourteenth Amendment had not been violated or denied (Appendix to Petition, p. 31).

The Court of Appeals, by its prior order of January 10, 1957, had affirmed an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

The Appellate Division order entered February 24, 1956, had unanimously reversed an order of the Special Term of the Supreme Court, New York County, annulling a determination of the Harness Racing Commission which had denied Murtha's application for a license as a mutuel clerk and had dismissed the application (Appendix, p. 32).

Jurisdiction

The jurisdiction of this Court is invoked by the petitioner (Br., pp. 2-3) under Title 28, United States Code, § 1257, subdivision 3.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment of the United States Constitution is the constitutional provision which petitioner claims has been violated. The New York statutory provisions which are involved are contained in Section 63 of the New York Pari-Mutuel Revenue Law (See Appendix, pp. 65-70).

The Question Presented

The very limited question presented by this petition is whether the Pari-Mutuel Revenue Law of the State of New York, in imposing limitations upon the employment at race tracks and the licensing by the State Racing Commission and Harness Racing Commission, of State employees and the employees of State subdivisions, has violated the rights of these public employees under the Fourteenth Amendment.

The Proceeding

The Decision of Special Term

In a proceeding under Article 78 of the New York Civil Practice Act, petitioner, a public employee, sought to compel the State Harness Racing Commissioner to grant him a license to work as a mutual clerk at a harness racing track.

The Commissioner, in the exercise of the powers granted to him by Section 41-a of the Pari-Mutuel Revenue Law (Unconsol. Laws, § 7599-a, 1957 Cumulative Annual Pocket Part, pp. 91-92) had refused to issue such a license to the petitioner, a person admittedly earning $6700 per annum as a county employee, upon that ground that it would violate Section 63 of the Pari-Mutuel Revenue Law (Unconsol. Laws, § 7615, 1957 Cumulative Annual Pocket Part, pp. 101-102), which at that time contained a prohibition against the employment at race tracks of public employees, unless the public employee's compensation was less than $5000 per annum (Appendix, p. 69).

Special Term interpreted the New York statute, § 63 of the Pari-Mutuel Revenue Law (as added by Chapter 514 of the Laws of 1954, and amended by Chapter 515 of the same Laws and Chapter 815 of the Laws of 1955) as not prohibiting the issuance of a license to the petitioner; and it directed that the license be issued (App., pp. 51-59).

As construed by Special Term (App., pp. 54-58), the bar against the issuance of any license to a public employee, imposed by subdivision 1 (a) of section 63 of the Pari-Mutuel Revenue Law (App., p. 65) was *completely* removed by the enactment of the 1955 statute (App., p. 70), even though, by its terms, in subdivision 7 which was added to section 63 of the Pari-Mutuel Revenue Law by the 1955 amendment, the removal of the licensing bar contained in subdivision 1 (a) was restricted to public employees who had been "qualified to hold such a license on or prior to April sixth, nineteen hundred fifty-four" (App., p. 79). Special Term did not deem it necessary to pass upon any constitutional question (App., p. 58).

The Appellate Division Decision

The Appellate Division construed the provisions of Section 63 of the Pari-Mutuel Revenue Law quite differently from Special Term (App., pp. 34-50). It demonstrated, by a careful analysis of the terms of the statute and a thorough review of the history of the New York legislation dealing with both harness racing and flat racing, that Special Term had misconceived the Legislature's purpose in enacting Chapters 514 and 515 of the Laws of 1954 and Chapter 815 of the Laws of 1955 (App., pp. 35-49).

As construed by the Appellate Division, the first subdivision of Section 63, as enacted by Chapter 514 of the Laws of 1954, enacted several prohibitions as to public employees. Paragraph (a) was construed to set up a *complete* prohibition against their licensing; paragraph (b) was construed to prevent them holding any proprietary interest in certain firms, or associations conducting track activities; and paragraph (c) was construed to prevent them from holding any office or employment with such firm, association or corporation (App., pp. 42-43).

The Appellate Division construed subdivision 6 of Section 63 (enacted by Chapter 515 of the Laws of 1954) to

relax the "employment" prohibition of paragraph (c) only as to a public employee of a political *subdivision* (with certain stated exceptions) whose compensation was less than $5000 per annum, if the local legislative body of the political subdivision authorized such employment (App., pp. 42-43).

It found the legislative purpose, in imposing employment restrictions as well as licensing prohibitions, to be to cover by paragraph (c) track jobs for which no license was required (App., pp. 43-44). Conversely, it was pointed out that the licensing prohibitions of paragraph (a) extended to persons other than "employees" of a track (App., p. 44). In other words, the Appellate Division found the restrictions against "licensing" and "employment" were intended to supplement each other.

The Appellate Division flatly rejected Special Term's construction of subdivision 7 of Section 63 (App., p. 45). It did not view that subdivision, enacted by Chapter 815 of the Laws of 1955, as lifting *entirely* the restrictions imposed by Section 63 upon a public employee. The Appellate Division illustrated the *limited* situations as to which the Legislature intended to remove the restriction on "licensing" (App., pp. 45-48). Finally, the Appellate Division pointed out that petitioner's "employment" at a track was barred by the prohibition of paragraph (c) of subdivision one of Section 63. And it observed that he lacked the standing to question the constitutionality of Chapter 515 of the Laws of 1954, for if, as he contended it were unconstitutional "because it is unreasonable or fails to grant equal protection", Chapter 514 of the Laws of 1954 would still remain, containing the provisions of law precluding petitioner from obtaining a license.

The Court of Appeals Decision

Upon petitioner's appeal to the New York Court of Appeals, that Court unanimously affirmed the unanimous determination of the Appellate Division, without opinion.

(2 N. Y. 2d 819). Upon petitioner's motion to amend its remittitur, it indicated that it had held that petitioner's rights under the Fourteenth Amendment had not been violated or denied (App., p. 31).

ARGUMENT

The petitioner, a public employee, was not deprived of any constitutional rights, in violation of the Fourteenth Amendment, by the provisions of Section 63 of the New York Pari-Mutuel Revenue, which prohibited the licensing of public employees by the State Racing Commission or the State Harness Racing Commission, except where the employee had been theretofore qualified to receive such a license; and which prohibited the employment at race tracks of all public employees, with very limited exceptions. The petitioner is not constitutionally aggrieved, by reason of the fact that the exceptions to the prohibition were drawn so narrowly as to leave the petitioner within the scope of the prohibition.

(1)

The petitioner has no constitutional right to work for the State of New York or any of its local subdivisions upon his own terms. *Adler* v. *Board of Education*, 342 U. S. 485, 492. New York clearly has the power to prescribe reasonable terms under which its employees or those of its local subdivisions may work for it. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, as to a similar restriction prohibiting federal employees from "taking any active part in political management or in political campaigns." And see *Thompson* v. *Wallin*, 301 N. Y. 476, 489-490, app. dism. 342 U. S. 801.

Section 63 of the Pari-Mutuel Revenue Law bears a reasonable relation to the New York Legislature's purpose to safeguard the concept that public office and public service is in every respect a public trust; and to disasso-

ciate public employment and public office from racing interests. See *Communications Assn.* v. *Douds*, 339 U. S. 382, 405; *Bryant* v. *Zimmerman*, 278 U. S. 62, 72-73, 77; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Hawker* v. *New York*, 170 U. S. 189, 192-197. See also *Linehan* v. *Waterfront Commission*, 116 F. Supp. 683, aff'd 347 U. S. 439 and *Staten Island Loaders* v. *Waterfront Commission*, 117 F. Supp. 308, aff'd 347 U. S. 439.

(2)

The exceptions engrafted in 1954 and 1955 upon the blanket prohibitions against the licensing of public employees by the Harness Racing Commissioner and the employment by racing associations of public employees did not render the prohibitions against such licensing and employment constitutionally invalid.

The exception as to *licensing* was created by subdivision 7 of section 63 (L. 1955, ch. 813), only in favor of persons who, prior to a certain date, would have been "qualified to hold such a license". The limited group in whose favor this exception could operate has been described in the Appellate Division opinion (App., pp. 45-48). In large measure, the exception, as construed by the Appellate Division, permitted licenses for track activities which did not fall into the category of "employment" by a racing association. Since New York's classification, so construed, rests on real distinctions as to the nature of the track activity for which a public employee may be licensed, there would appear to be no reason for this Court to assume jurisdiction herein. The power of a State to classify upon any reasonable basis has unquestionably been recognized by this Court. *Borden's Co.* v. *Baldwin*, 293 U. S. 194; *Walters* v. *City of St. Louis*, 347 U. S. 231, 237.

In the "employment" exception which was enacted, to add subdivision 6 to section 63 of the Pari-Mutuel Revenue Law (L. 1954, ch. 515), the New York Legislature adopted

a classification, whose reasonableness would seem not to be subject to constitutional attack. Under its terms, the absolute prohibition against the employment of all employees of the State itself, remained unchanged. The Legislature merely delegated to local legislative bodies of the political subdivisions of the State a very limited measure of "home rule". To these local legislative bodies, which presumably had a more intimate knowledge than the State Legislature of the interests, activities and possible dangers of the political tie-ups of their employees, it entrusted the discretionary power to permit only their lowest paid employees, if they were not engaged in certain law-enforcement activities, to obtain race-track employment. We do not believe that this Court will be interested in passing upon the wisdom of this very limited experiment in "home rule". *Adams* v. *Milwaukee*, 228 U. S. 572, 583; *Communications Assn.* v. *Douds*, *supra*, pp. 400-401; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489, 491.

The petition for certiorari should be denied.

Dated: New York, N. Y., October 14, 1957.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Respondent
80 Centre Street
New York 13, New York

JOHN R. DAVISON,
Solicitor General

DANIEL M. COHEN
Assistant Attorney General
Of Counsel